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Edited Transcript of Symposium on Public-Private Partnerships, "Public-Private Partnerships: A Vehicle for Economic Development and Promotion of the Rule of Law"

ARTICLE

EDITED TRANSCRIPT OF SYMPOSIUM ON PUBLIC-PRIVATE PARTNERSHIPS, "PUBLIC-PRIVATE PARTNERSHIPS: A VEHICLE FOR ECONOMIC DEVELOPMENT AND PROMOTION OF THE RULE OF LAW"

University of Baltimore School of Law
Appellate Moot Courtroom,
John and Frances Angelos Law Center
Thursday, April 9, 2015

I. Introduction

The University of Baltimore Journal of Land and Development hosted a symposium on Public-Private Partnerships (P3s) and their impact on economic development and the rule of law. The main topics of the symposium were what is a P3, the key elements of P3 legislation both internationally and nationally, the historical development of P3s, and with the foregoing in mind what is the role for attorneys during the lifecycle of any P3? The following is an edited transcript of symposium and the discussion that followed.

II. Welcome

MICHAEL FARRELL: Good Evening. Welcome to the University of Baltimore Journal of Land and Development Symposium on Public and Private Partnerships. I'm Michael Farrell. I'm the Editor-in-Chief of the Journal of Land and Development. This past summer the Journal set out to find an engaging, novel, and thought-provoking topic for its symposium. While searching for such a topic, the editorial board of the Journal was guided by the reverberations of current events in Maryland, like the development of the Red and Purple lines and the State Center project. These events, and the interest that was generated by them, both in the community and the legal field, led the board to focus on public-private partnerships as a topic for this symposium. What we found was an incredibly complex, nuanced, interesting, and in some instances, a very divisive topic. We felt that with the Journal's mission and academic purview we could foster an intriguing and productive discussion about public-private partnerships, their impact on economic development, and the law.

This brings us to today and why we are here in the moot court room of the University of Baltimore. Before we introduce the distinguished panel of speakers who were gracious enough to come down and speak with us today. I would like to thank a few people. First off, the dean of the law school Dean Ron Weich for supporting our efforts to host the symposium this year. And I'd like for him to come up to say a few words.

DEAN RONALD WEICH: Well, thanks Mike. And welcome all to the University of Baltimore School of Law. Many of you are students or professors here so no need to welcome you. But those of you who are visitors, I hope that you will take time while you are here to take a look at our beautiful building the John and Frances Angelos Law Center. We are very proud of it. Very proud of the fact that it is such an environmentally sound building, very much in keeping with the themes that the Journal of Land of Development has often explored. We're very proud of the Journal and the work that it does. I'd like to congratulate Mike Farrell, Alex Gereldo, and the other editors and officers of the Journal for its hard work this year. Not just in bringing this symposium together but in publishing the journal and doing all that they do to keep this activity of the law school very strong. I'd like to thank and congratulate Professor Audrey McFarlane, the faculty advisor to this journal. And if you all permit me a moment to congratulate Audrey as well because this Sunday she will receive the law school's annual award for outstanding teaching by a full-time faculty member. And I'd also like to thank our distinguished panelists. It seems like this is going to be a very substantive and important discussion about the topic at hand. I commend you all for spending your time here to learn and explore this very important issue. Thank you very much and welcome.

MICHAEL FARRELL: Thank you Dean. I'd also like to thank Dean Shultz for her guidance and support when we first brought the idea of a symposium on public-private partnerships. I want to thank the Journal's faculty advisor Professor Audrey McFarlane for continuingly challenging us so that we could find a topic and host a symposium that would foster legal scholarship on public-private partnerships. Furthermore, the Journal is indebted to Professor Scott Walchak for not only contributing to the Journal but also facilitating the procurement of the distinguished panel speakers that are assembled for the symposium. Lastly, and as a means of introduction, I would like to thank Alex Geraldo the Journal symposium editor. Alex has devoted substantial portion of his time this year to bringing about the symposium from the moment we first started talking about it in May of 2014. Alex's tireless efforts, sometimes in the face of great obstacles, are truly the reason that there is a symposium today. So without further ado, I would like to turn it over to Alex Geraldo for the introduction of the panel.

III. Introduction of the Panel

ALEXANDER GERALDO: I appreciate Mike's kind words and I assure you the check is in the mail. As Mike just mentioned, my name is Alexander Geraldo and I am the Symposium Editor for the University of Baltimore School of Law Journal of Land and Development. And I'd like to welcome you all and thank you as well for attending tonight's event 2015 Journal of Land and Development Symposium on public-private partnerships. It should be noted in advance and Professor Walchak would reiterate this, that there are various terms for public-private partnerships. So if during this presentation you hear the title PPP or P3s or the like, know that that its all one of the same and interchangeably used.

Now before I introduce the illustrious panel of speakers we have here today, I would like to reiterate some of Mike's sentiments and like to acknowledge some people who have made tonight's event a reality. First, I would like to thank Dean Ronald Wiech and Associate Dean Victoria Shultz for their guidance in helping the Journal shape this topic of P3s and sharing the knowledge on us of both legislative and policy implications of P3s from both a private and federal prospective. I also would like to thank Heather Cobbett, the assistant director of external relations communications for the school. Unfortunately, Heather was not able to attend tonight's event. But, I would like to thank her for being a godsend. She has literally helped with the logistics and the most minute details for tonight's events. I would also like to thank Professor McFarlane and I was not aware of your award but that is a great honor. So, I would like to give you one more round of applause for that. [Applause]

Not only is she our faculty Advisor, but Professor McFarlane brought the topic to the forefront when I was trying to decipher a topic for this symposium. But I would also and most importantly like to thank you for zealous advocacy in presenting the goals of our Journal and always arguing and articulating in every capacity possible.

And finally, and by way of introduction, I would like to thank Scott Walchak. His contribution to the journal has been immense, not only for your ability to publish an article that will be coming out shortly, or being a panel speaker here tonight as well as a moderator, but for your collaboration. You have truly been a collaborator every since and I'd like to consider you a friend. And as such, and without further delay, I would finally introduce our panel members beginning with the after mentioned Scott Walchack.

Scott Walchack is a deputy counsel to the Maryland Department of Transportation and former principal counsel to the Maryland Department of General Services. Both control agencies of the state focusing on the state's infrastructure as is. He focuses on real property transactions and procurement and has been the lead counsel to a number of the state's largest infrastructure projects. Including the state center project a proposed 1.5 billion redevelopment of a 28-acre state office complex in mid-town Baltimore. The construction of the new state of the arts State Public Health Lab adjacent to Johns Hopkins Hospital and currently advises on the Purple Line project the second ever PPP light rail transit line in the U.S and the first in suburban Washington DC. Mr. Walchak is a adjunct professor here at the University of Baltimore School of Law in areas of estate and finance and is an adjunct faculty at the International Law Institute in Washington D.C. teaching in areas of PPP, procurement, and project monitoring and evaluation. He has served as an expert to the United Nations Commission on International Trade Law and currently to the United Nations Economic Commission for Europe.

Next we have L. Preston Bryant Jr., a senior vice-president in McGuireWoods Consulting LLC in Richmond, VA, where he advises clients on infrastructure and economic development projects as well as structuring public-private partnerships. He served as Virginia's Secretary of Natural Resources in the cabinet of Governor Timothy Kaine from 2006-2010. In that position, he headed the state's six environmental, recreational, wildlife, and historic resources agencies; a staff of over 2,000 and a $420 million annual budget. He also helped write Virginia' first-ever statewide energy plan and chaired the governor's commission on climate change. Prior to joining the governor's cabinet, Mr. Bryant was an elected member of the Virginia House of Delegates from 1996-2006 and he also was a partner in the Virginia-based civil engineering firm and while in the House Mr. Bryant served as lead sponsor of Virginia's innovative PPP procurement statute. He received his B.A. from Randolph-Macon College in 1986.

Martin Jacobson is a retired partner at Simpson Thacher & Barlett LLP. Mr. Jacobson has a broad range of experience in financial transactions, concentrating in the financing of infrastructure, industrial property and transportation equipment. He has represented sponsors, lenders, underwriters, and other credit providers in domestic and international transactions. He is He is a Lecturer in Law at University of Chicago Law School. He is the founding chair of the Project Finance Committee of the New York City Bar Association and has been listed in the Chambers USA Guide to America's Leading Business Lawyers in the international 'Who's Who' of Business Lawyers among others. He is a senior advisor at the International Law Institute in Washington D.C. He received his B.S. degree Summa Cum Laude from the University of Pennsylvania in 1969, his MBA from New York University Stern School of Business in 1973, and his J.D. from the University of Chicago Law School in 1976.

Next we have Ms. Shukla a senior consultant in infrastructure finance at the PPG Group of World Bank. Prior to this, she worked as an advisor to the executive director at the World Bank in its undertaking technical assignments at the Asian Development Bank, the Islamic Development Bank, and the Reserve Bank of India. She has over 25 years of experience in infrastructure financing, policy and regulation with specific expertise in PPP arrangements, innovative finances, and support instruments, project designs, structuring and implementation. She has a MPA from Harvard University Cambridge, Massachusetts and a M.S. in Financing from Johns Hopkins University in the United States.

Next, my Portuguese brethren as I like to consider, Mr. Patrick Decorla-Souza is a program manager for the public-partnerships in the Federal Highway Administration Office of Innovative Program Delivery. His technical papers and articles have been published in various professional and trade journals on a wide variety of topics including benefit-cost analysis, P3s, road pricing, multi-modal transportation evaluation, travel demand modeling amongst others. He has a Masters degree in Transportation Planning from Florida State University and a Civil Engineering degree from the University of Toledo, and a Bachelor's Degree in Architecture.

Next we have Ms. Jodie Misiak, director of project delivery for the Maryland Department of Transpiration, or what we like to call MDOT. As director as innovative project delivery, Jodie guides the departments P3 and other innovative project delivery initiatives including all stages of project development, solicitation, and delivery. She has been MDOTs point person for recent statewide efforts to strengthen and clarify P3 policies and processes, including the 2011 P3 commission and the P3 law that was enacted in 2013. Prior to MDOT, Jodie has held positions in economics and business solutions groups at municipal securities groups at UBS specializing in transportations in P3s. She has a Bachelor's Degree from John Hopkins, a dual Master's degree in City Planning and Transportation from the Massachusetts Institute of Technology.

And finally we have Mr. Smolen. John Smolen is a project development and project finance attorney with a Washington based office of Nossaman LLP, a full service Los Angeles based law firm that focuses on infrastructure. He primarily advises on public-private partnerships, generally representing public sector clients on procurement, contract negotiation matters and project management issues. John also has extensive experience in engineering procurement and construction project contracting and energy and emerging technology projects, having led project development efforts and having served as project counsel for wind, solar, and geothermal energy projects, among others. He is active in the National Council for Public-Private Partnerships and has spoken at Design Build Institute of America events. He graduated from the University of Kansas School of Law, where he was editor-in-chief of the Kansas Journal of Law and Public Policy. He currently resides in Anne Arundel County, having graduated from the U.S. Naval Academy after which he served in the U.S. Navy. Without further ado Scott Walchak please come up and begin your presentation.

IV. Opening Remarks

PROFESSOR SCOTT WALCHAK: Alright. . .well thank you everyone. Hopefully you can hear me okay I have my water up here and am ready to go. Thanks to the panelists and the University of Baltimore School of Law for having us all here tonight. We are obviously excited to talk about our area of law, we love what we do I am sure we can all say that with confidence. I want to laugh a little bit. I think Mike had mentioned earlier how Alex overcame great obstacles to get us all here tonight. I was one of those obstacles. I am a full-time practicing attorney with the Office of the Attorney General and it's very difficult to do that and be a professor. I have great respect for the professors here and the amount of time and energy it takes to put together an article. I am still in the process of putting my article together. Little did I know, it's been 15 years since I have tried to put an article together, I have been out of school that long. I am not sure I will try it again after this go-around.

However I do have an excerpt from my article and I would like to introduce the talk by way of that. It's a short little introduction to my paper, but ultimately its going to a segway to our panelists who as you can tell are some of the leading experts in their areas. Each represents their own area of expertise their own practice area and their own industry in some cases, it's a really wide variety of backgrounds.

Let me first start with my piece and then we will get into some of the other substance. So my paper obviously is going to discuss public private partnerships and it's in the context of global development. Generally we are going to hear a U.S. based approach, a Federal, a state approach, the World Bank's view, an academic perspective, a wide spectrum for sure. My paper sort of focuses on the discourse related to public private partnerships and what's happening.

Maryland is fairly new to this environment, we passed a P3 law not too long ago. Jodie and I worked on that law, we still work together on P3 projects for the state. The US experiences is not like the global experience. Globally P3's have, through fits and starts, progressed in different ways. The US experience has been focused on primarily transportation projects if I can take that liberty to say that. In other parts of the world it's not that way, its service contracts, it's other infrastructure needs of the various geographic and natural based interests. So let me read my excerpt then we will move on from there.

Since the inception of public bodies governmental entities have struggled with ways to provide public services and achieve their missions. Governments invent, develop, redevelop and discard tools all in hopes of better delivering public services and meeting their public-purpose goals. Public private partnerships are just such a tool and they are being used more and more by government entities and Maryland is a prime example.

So as a basic introduction P3's are contractual arrangements. They are between a public entity and a private sector party or multiple parties and the idea is that the skills and assets of each is shared in delivering this public service or infrastructure facility and each party is to share in the risks and the rewards of the venture.

Public private partnership can address virtually any public need, from the provisions of water and waste water to the creation of transportation, energy and urban infrastructure generally. They can be a means for economic development to the basics of providing social services to the public that they serve. Over the last several decades Europe and other regions have paid particular focus to P3's and this trend toward embracing private participation and investment in public projects has gained significant traction in the U.S. as well. In fact there has been a swirl of recent discussion and attention paid to these projects and this mode of providing services.

It is possible that it cannot have come at a better time, global infrastructure is projected to require an estimated 57 trillion dollars in investment by 2030 with much of that being needed in developing countries. Experts and officials worldwide continue to struggle with how to meet those needs and Maryland is no exception to the rule. In 2002 the United Nations announced its Millennium Development goals. The goals were established to guide global and regional development efforts and encourage progress in a number of areas: eradiate extreme hunger and poverty, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV and AIDS, malaria and other diseases, ensure environmental sustainability and develop a global partnership generally for development. Each goal had its specific targets such as reducing the under five child mortality rate by two thirds and it also contained indicators by which these specific targets would be measured such as *modern* mortality rates compiled by the United Nations Children's Fund, also known as UNICEF, and the World Health Organization. So in all that time three targets were met and that's just three targets within the eight generalized goals. So many goals remain unmet.

It indicates that a lot more work is still needed. With this unfinished agenda the United Nations is setting the course for the near future and looking this fall to post a 2015 Development Agenda at a 2010 high level plenary meeting of UN General Assembly the United Nations General established a task team to begin planning for the new agenda. The process of establishing the new goals contains many contributors but the key consultations include both nation, regional and global input from both developed and developing countries and public the public private sector.

It's expected that this process will culminate with the UN adopting the new post 2015 Development Agenda at a special summit on sustainable development in NY in September of this year. All of you can attend if you are interested, I will actually be there so if you are interested in the subject I encourage you to attend. With the lofty goals of the 2015 Development Agenda, the goals being set in New York in just a few short months, it's clear that international development challenges remain largely the same. The global community is faced with a population that is continuing to expand and it's expected to reach 7 billion in the near future and it may reach 9 billion by 2050.

Developing countries and transitional economies continue to grow and developing economies require more resources and infrastructure to sustain that growth. Virtually every region of the globe continues to experience rapid urbanization as well. This places an even greater amount of stress on the infrastructure and the systems that are required to service all those populations. In developed countries existing infrastructure is aging, that is the case in the U.S. it's one of the reasons why we are looking at P3s. Replacement or new infrastructure is needed all the time and on the other side, in developing countries critical infrastructure is often insufficient or non-existent. As a result global economic and population growth will tax our existing resources and infrastructure to ever greater levels.

The world economic forum believes that to support a future global population of 9 billion people approximately 5 trillion U.S. dollars per year needs to be invested in global infrastructure. The Organization for Economic Cooperation and Development estimates the financing gap to achieve all of that will expand to 36 trillion dollars before 2030. That's approximately 24 trillion dollars of funds already earmarked for infrastructure before 2030 and an estimated 60 trillion that's needed overall. So to meet those needs officials are scrambling to respond and seeking public sector capacity and development.

Many experts believe innovative approaches like public private partnerships can address these heightened demands. They see P3s as an important tool in accomplishing the post 2015 development agenda and generally the needs of the future. However in order to reap the rewards of P3s proponents must be more precise with how they promote them. After all as a government lawyer P3s are simply another form of public contract and they occur within the context of public laws as well as public administrative systems. Understanding this limitation one realizes that P3s may or may not be the panacea for public international development. There are constraints on what these projects can achieve.

So my article seeks to shed light on the true nature of P3s by exploring some of the common descriptions of public private partnerships. It suggests that while convenient, descriptions are often insufficient and that P3s need to be accurately defined as contracts arising from a distinctly public process and occurring within a distinctly public administrative environment. In my article I discuss differences in public laws and administrative approaches, with various national examples of current public private partnerships provided. I also reference various national and international efforts for establishing effective public private partnership institutions and supporting P3 projects generally. All leading up to the main conclusion; that public private partnerships are enabled yet constrained by the boundaries of public environment.

But on a practical level, I go into a lot of detail about the discourse of P3s changing over time. I think original proponents of public private partnerships, you can describe them in a number of ways. You can describe them by type of contract- is it a lease? is it an affermage, it's a french version of the lease, which tends to focus on the provision of water services to rural communities. Is it a concession? You'll hear that phrase quite a bit. Is it a B.O.T. – build operate transfer? So, there's all these acronyms and titles you'll see. That's just describing it by what the contractual framework is. Sometimes experts look at it instead, and say well, 'a PPP can be measured by the degree of the private sector's control over a public infrastructure asset or service.' The greater degree of private control, the more of a PPP that you have and you've moved away from the traditional public sector delivery of those infrastructure needs or services. There's just any number of other ways to describe it. I think that we've turned a corner. Those were helpful descriptions when we were trying to put form on something, and we weren't sure what exactly it was. Ultimately as a government attorney, as someone involved in the day-to-day work doing public-private partnerships and creating a legislative regimen like we did in Maryland. I believe PPP's are very jurisdictionally based. They're defined by the legislative and administrative environments, in which they sit and in very real terms, they're defined by the administrators that decide to undertake them. The solicitation for the private party contributors to the project is drafted by the administrators. Once the contract is awarded, it's managed, it's run, it's evaluated, it's reengineered and it's approved, by the public sector administrators.

Once you move beyond the big picture descriptions, you get into the delivery of these projects. Just as an example — this is one of the sections my paper talks about — various legislative approaches. In California, not too long ago, a PPP was five specific legislatively authorized projects, only in transportation. Over time they've sort of broadened that and they've given more, generally enabling the legislation to allow these projects to occur, but that took some time. If you take, for example, South Korea. South Korea's P3 law has specific procurement mechanisms embedded into the law that controls how these arise, that can dramatically affect the type of projects you have and the outcome of the project. In other instances, if you look at, for example, Ireland's PPP law, they emulate the UK. The UK is one of the earlier adopters of P3s and virtually every jurisdiction has a different approach. I do want to note on Ireland's point, is that they embed specific contractual frameworks in their legislation.

So, I think going forward, as we turn this corner it's less about the global descriptions and more about lessons learned on the ground from actual legislative environments and actual projects, that have occurred and improving those systems going forward. So the task tonight really is not mine, going forward. I have worked to get a representative example, to get P3 practitioners in all areas and you will see that there is probably not one definition of a PPP — they all have different projects that they've experienced and different sectors that they have focused on so before I continue on-

QUESTION FROM THE AUDIENCE: Can you or either Jodie address how Maryland statutory framework that corresponds with contract law, because to me that's very important because the private developer is in contract with the private agency, could you briefly explain that?

PROFESSOR WALCHAK: Jodie do you want to hold and do that during your 15 minutes because I think I'm supposed to sit down.

JODIE MISIAK: I think it would be good if my Attorney General representative would address that issue. I'm not an attorney.

PROFESSOR WALCHAK: Let me give you the short answer. It is another form of procurement. So whenever the government engages with a private sector entity, it spends public dollars. It's typically, unless carved out by legislation, it's typically required to go through the public procurement process. Which is called Division II of the state finance procurement article, for all the UB law students, go look it up. Well, Division II handles most of the goods and services procurement for the state, but there are many activities where the state will engage contractually with private sector parties that are outside the procurement system. And that is what the P3 law was created to do. For many reasons, which we could probably have a whole seminar on that, but it is basically a miniature procurement system, dedicated to these types of projects. It still has a competitive environment RFP. You can put a solicitation out, you can put potential proposers in, but it is segregated because it inevitably involves the assets of the state because they're being used by a private sector entity, which is not typically the case when the state goes out and just buys goods and services from a contractor. So it has special needs and that is why and one of the reasons, why it was set apart. But I will hold. You will get a lot of color on these projects, going forward. These guys are fantastic and I think I need to turn it over to Preston Bryant, who is our consultant perspective, from McGuire Woods. He has a fantastic background in PPPs, Preston it's to you. . .

V. Panel Remarks

Panelists:
Preston Bryant, Senior VP, McGuireWoods Consulting, and former member of the Virginia House of Delegates
Professor Martin Jacobson, University of Chicago Law School; retired partner, Simpson Thacher & Bartlett LLP
Shyamala Shukla, Senior consultant/advisor, Infrastructure Finance, World Bank
Patrick Decorla-Souza, Public private partnership program manager, Office of Innovative Program Delivery, Federal Highway Administration
Jodie Misiak, Director, Innovative Project Delivery, Maryland Department of Transportation (MDOT) Office of Innovative Financing
John Smolen, Associate, Infrastructure Practice Group, Nossaman LLP, Washington, D.C.

PRESTON BRYANT: Good evening, I'm Preston Bryant and I'm from Richmond. This is my first time at the law school here and I love it. What a terrific facility. Thank you, Alex, for organizing this and inviting us all. What I wanted to do is talk a little bit about the Virginia law, because the Virginia law is probably one of the granddaddies of the state P3 laws and so many other states, as I'll show, have adopted the Virginia law, in whole or in part. So part of the madness in me going first, may be to provide some foundation here in Virginia. And this is what I'll sort of talk about: the legislative history, the fact that as Scott said it's just another procurement tool, that's what it is, how the Virginia law works, the process and some projects and pros and cons.

In Virginia, we had passed in 1995, the Public Private Transportation Act. You may recall in the early 90's we had a new Governor, George Allen. He was a very conservative Republican, 'small government, we're going to shrink everything and we're going to outsource a lot.' They undertook a 1994 study to look at outsourcing and public private partnerships. They first focused on transportation and that led to the passage to what we call the PPTA, the Public Private Transportation Act. It actually ended up being very successful. And after seven years of pretty good success with the PPTA, we passed in 2002, the Public Private Education Facilities and Infrastructure Act. Big emphasis on infrastructure, which we have shortened to PPEA. For some reason, 'Public-private everything else some people call it' and that has been more of a social infrastructure, everything from K-12 schools, to wastewater treatment plants, to court houses, to you name it. So I'm going to focus, not so much on transportation, as some others will focus on transportation. I'm going to talk about Virginia's social infrastructure law.

The history of it, as I just said, the transportation act passed in '95, the social infrastructure act in 2002, and then we spent a year working on the model guidelines. What are guidelines? The guidelines really are, as this is a procurement tool, the guidelines are the rules of the road. The rules under which a developer will propose a P3 project and the rules under which the public entity will consider and act on that proposal. So everybody's on the same sheet of music, when it comes to the procurement statute. Everyone has the same set of guidelines. Now these were model guidelines and we spent the year developing them and before at the local government level a P3 project can be done or be even proposed. The local government will have had to have adopted those guidelines and if they haven't, you can't even consider it. And as a matter of business, most local governments in Virginia have adopted the guidelines. They're allowed to tailor them to their own color, if they would like. Most have adopted them, just as a matter of routine business, to have them on the shelf in case they ever get one of these P3 animals proposed to them.

So right after we adopted the guidelines, the projects started rolling in at the local government level. There's a state P3 law, as well. Since the last ten years or so, in Virginia there have been somewhere between 150 and 200 what I would call fairly significant P3 infrastructure projects. And again everything from water, wastewater, to schools, to you name it. I'll mention a few of those.

When I mentioned that the Virginia laws have been somewhat foundational, you can see that, in whole or in part, the Virginia law has been adopted by a number of these other states. All told, there are about 39 states across the country that have some form of a P3 law. Some are more robust and broad, than others. The Utah one, for example, for many years and I don't know about it now, was really confined to just IT. But not transportation and not other things, but whether that's still the case or not I don't know. But some were more robust than others.

Currently, me and my firm, we are working to try to get passed in those states that you see there – Arkansas, Kansas, Missouri, New Mexico — and New Mexico just sort of went down in flames, I believe a week or two ago. There were some public employee unions who had some concerns. Others will talk about the Maryland law. We were very active in getting it passed in Texas and Governor Perry signed it a few years ago. Just last week, or a couple of weeks ago, March 2015, just a few weeks ago, it was passed in Georgia. We'd been active in Georgia trying to get it passed for quite some time.

The Georgia law, like the Virginia law, and if you look at the Georgia and Virginia laws, they're almost word-for-word. The Virginia law, and the same was true for it in Texas, the Virginia law was very much part of the Georgia law. Both of them start the act, with legislative findings. At least in the Virginia Code, it is a little bit unusual to have legislative findings as a preamble for a significant statute. The fact that the legislature in Virginia and Georgia did it tends to speak to the importance the legislature is trying to impart to the reader of the law of this act.

That the legislature went so far as to create findings as to why this is in the public interest. The Georgia statute, I just list a few of the findings because that will serve as part of the history of this and on the foundation of the P3 law. The Georgia legislation had five sort of key legislative findings. First, keying off of what Scott was saying, there is a public need for timely acquisition design construction rehab, equipping, etc. of public infrastructure and government facilities, so there is a public need. Second, current procurement methods may not meet that need. Third, public resources are inadequate to meet the public need for infrastructure in government facilities improvements, precisely what Scott was saying. Fourth, financial incentives exist to entice public private partnerships. And fifth, last, private entities may be a part of the solution to timely meeting this public need.

So that was the statement of the Georgia legislature, similar one of the Virginia legislature, to put out there why this following act of the code is important. The Georgia law, you can see, that's sort of the way its laid out, and Virginia law is very much like that as well in terms of the elements of the act.

In Virginia we really have three procurement statutes. One is the traditional RFP design-bid-build. It's the very traditional, very structured, not very flexible price rules kind of act. We all know it, that's it there and really the bottom line is construct to the plans. That's what you do. Price, price rules in this particular procurement.

Second, we also have the design build law, which is when the contractor and the architect and or engineer get together, take a team approach to designing, constructing, financing a project. Design build is often good for kind of your bigger more complex projects.

Then the third, and this is what we'll talk about, the Virginia P3 law. Our P3 law is good for both local and state projects. Mr. Jefferson's capital building, four-five no, six or eight years ago underwent a little over $100 million renovation. It was a public private partnership. It was procured under the state's P3 statute.

They can be solicited or unsolicited. In Virginia the vast majority are unsolicited. Unsolicited does not mean unexpected. The proposer will have gone to the county local government and say I have an idea. They will walk through it. Are you interested? The local government will likely say yes. Lets talk more. You will enter into weeks or months worth of discussion before the developer takes it upon himself to do something very capital intensive, labor intensive, completely at risk, and to present, prepare his proposal.

When all said and done, the P3 law in Virginia is kind of de-facto design build. It's kind of glorified design build. Equally it's nice to know what it's not. It's not a financing tool. It doesn't create any new financing mechanisms. It relies on the existing mechanisms that are available in Virginia law. For the social infrastructure projects, it's the general obligation debt, its some tax financing, land swaps, all of those kinds of things, that really you can't do, or can't do easily under a traditional RFP low-bid-build kind of procurement statutes. But you can do things like this, much more flexible.

The Virginia law, these are the qualifying projects. And actually in the code we spell out, we enumerate, we list what qualifying projects are. And so those are the broad categories. And I think just about something in all of those has been done. Northrop Grumman has done a number of 911 or emergency communication facilities in several local governments. The technology infrastructure side. A lot of schools, a lot of municipal parking decks around the state have been built this way.

Then there's this, this is kind of the catch all phrase, and keying in on it is the important elements of this is that a project must be publically owned and have a public purpose. But if you look at it, you can drive a truck through this in terms of how broad it is. If any building or facility that leads to a public purpose and is developed or operated by for any public entity and it is any improvements necessary or desirable to any unimproved local or publically owned real estate. So almost anything is publically owned for public purpose. If you want to improve it, you can almost use this as a catch all in pursuing.

What has been done? These are the kinds of things that have been done all over Virginia. Most of these are local projects, local government projects. Some state projects, but the vast majority are local. The process, it goes like this.

There are a couple of slides here that take you through the process, but it really has three elements to it. One, is there is the conceptual proposal. Second, there is the detailed proposal. Third, there is the comprehensive agreement or the contract. Scott said it's a contract when all is said and done.

What happens is, I have an idea, I know that Fairfax county needs a new high school over there. Its not even on their six year plan yet. But time being, money being cheaper now than 10 years down the road, I may put together a team of a contractor, architect, and engineer and go to the Fairfax county and say "I know you need a high school on that side of the county. We also happen to have on our team Farmer Smith who happens to own 75 acres that he's wiling to get rid of. You know Farmer Smith is a developer and over there where the county owns its maintenance shed, he would like that property because he has some ideas to develop that into a mall of some sort. And so, that's the flexibility of Virginia P3 law. You can't put together that kind of land swap kind of project. Just a regular low bid build RFP kind of project for a high school. But you can think broadly and imaginatively of the Virginia law to try to do something like this. So he will get the, the developer will get the okay to present the proposal.

The local government will actually have to vote to accept it. It's not the end of the story. They accept it to keep the process going and then they have to advertise it for at least 45 days, maybe longer, to give others a chance to submit competing proposals. It can be 60 days, it can be 90 days, the bigger and more magnificent the project, in all fairness, you should string it out a little bit to make sure that others have a good opportunity to put in a competing proposal.

Then they will down select, they will say, they will select, they may get two three or ten other proposals, or they may not get any, but they will down select, and then they say 'we will take you two or three to the second stage,' the detailed phase, and the detailed phase is where you really sharpen your pencil. Your construction budget your timeline, you really put forth your best foot.

Then they will select one and then they will go to phase three which is the contract negotiations, that this is competitive negotiation, that this is, at the end of the day, competitive negotiation.

Why do we do this in Virginia? Not unlike with the findings were in Georgia law and the state law. There is a need. There's not enough money. There is a lot of public-private capital out there that can play a role. What is the structure to do it? So they wanted a consistent, repeatable, predictable process for alternative project delivery and that is the basis of it.

The last couple of slides is just, and you have, I think you all have a copy of my presentation, the last couple of slides are what are the pros and cons. Pros are the public sector that you can build. The public body can say "I would really love it if you guys work with this architect and this contractor" We've had great experience with them. That's legal. They can build their design team, their dream team. It's very flexible that allows for private capital to be brought to the capital.

The cons, it's a learning curve because it's a fairly new procurement statute that it's a learning curve for public officials. Early on there was the smoke filled back room concerns. But we went overboard when we wrote the statute. There is actually more public hearing and public involvement in the Virginia P3 statute procurement process than there is in the traditional low bid procurement.

Last, just dispelling some of the myths. It's not good for every project. It's very tailored. The vast majority of capital projects in Virginia are the low bid build. So it's not for every project. It does not print money. It's not a financing tool. There are not secret negotiations. We go out of our way to keep it open. It's not necessarily cheaper, but there may be greater values than simply the low bid. It is not privatization which was often the myth as well. And again, that's just the wrap up slide, most of which I have said already. We are at work all over the country doing these kinds of things. So I look forward to your questions afterwards.

PROFESSOR WALCHAK: Alright, fantastic, thanks Preston , you actually stayed very close to your fifteen minutes so I appreciate you looking up and seeing my one minute sign when it was there. He hit on some of the policy issues that I really encourage you to consider at the end of the session. We are going to have a question and answer moment there. You know PPPs are sometimes perceived as inviting in private sector input into public sector decision making. There is a lot of policy issues associated with these aside from the mechanics and how these actually works. But to get a little more mechanics and when these are used as finance, they are often times an alternative financing mechanism for something that the government would not normally run through its capital project queue and do it in a traditional way. It may leverage operating dollars, for those of you who have an accounting background, they may utilize different pools of funds to sustain these types of projects. I don't pretend to be a finance expert, but I do believe that Professor Martin Jacobson is a little further along in that area than me, so let me welcome Marty on to the podium.

MARTIN JACOBSON: I am delighted to be here. Thank you for attending. Thank you Alex, Scott, and everyone else involved here. This is my first time to see your beautiful new facility and it's very exciting, so thank you.

I want to focus on financing these infrastructure projects. But to do that I want to cover some basic concepts first, some of which we have already touched on. I'll try to not be repetitive. I guess I'll start with just a little bit of history. If you go back in history, you will see as far back as the reign of Caesar Augustus references to toll roads. And all throughout history in different countries there is a private investment, private participation in infrastructure. If you think of how the rail, water, sewage, gas, electric, industries were developed in this country, private financing has played a large role.

What are PPPs? The International Monetary Fund uses the word "arrangement." Formulation is to say PPPs involve private sector participation in the provision of public infrastructure facilities and services. This is much more than finance, but finance is a key component. It rather has a lot to do with the role of government. Moving away from traditional government procurement of operating facilities in the direction of the government defining service outputs, and relying increasingly on the private sector to accomplish the intermediate steps leading to the provision of those services. For example, designing and building the facility. These projects are built on the fundamental concepts of risk allocation and on the use of incentives to encourage performance. We're going to come back to risk allocation and efficient assignment of risk.

First, now a couple of basic concepts. One is a term that has come into use is "project agreement." We heard a little while ago and frequently in the literature we see reference to concessions, licenses, affermages in France. The comprehensive term is really "project agreement."

A project agreement is an agreement between the relevant company that is going to carry on the project and the relevant governmental activity. This is typically a single purpose company. So rather than try to understand the difference between concessions, franchises, licenses, and so on, I think we can say in general terms that it is the agreement between the relevant public authority and private company that sets forth the terms and conditions under which the infrastructure project will be built and its services regulated by the government.

I would refer you to a publication entitled the "Guide on Privately Financed Infrastructure Projects" which was published by the United Nations Commission of International Trade Law (UNCITRAL) in the late 90s and the early part of this century where these basic concepts (largely in the context of developing countries, but applicable generally) are discussed quite well.

The next basic concept I want to mention is the means by which the private sector is to participate in the provision of the public infrastructure services. The private sector could own the facility. It could operate and maintain the facility. It could provide funds and do some other things. But basically when you talk about the way in which the private sector will participate there is a range, all the way from ownership and operations, full responsibility, to shared responsibility, where the private sector merely takes on certain operation and maintenance functions.

Familiar acronyms like BOT and BOO describe transaction structures in which a varying role of the private sector is provided for.

The next basic concept that I want to discuss is the source of revenue for the project. Where are the revenues? Because if you are going to have private investment infrastructure a critical consideration is the source of revenue to pay back the private sector investors. Some what surprisingly, this is in some ways a relatively new concept in the world of public infrastructure.

There are two basic revenue structures. One is based on usage. Highway tolls are a good example. But for social institutions such as hospitals, the revenue structure will likely be based on a fee for availability. Of course the financial concepts are not new, but rather applied in these projects as appropriate for the particular infrastructure asset. It is essential we can classify these infrastructure assets as principally economic in nature or social in nature. Economic infrastructure is capable of generating revenues out of its own operation. Social infrastructure, such as hospitals and schools, are not. Despite these fundamental differences between economic and social infrastructure we find many commonalities in financing techniques.

The next concept is the proper framework for Public Private Partnerships. Once again I would refer you to for an excellent discussion on this topic in the UNCITRAL Guide. In general, the overall framework begins with the constitution, or equivalent of the country.

Then you come to the legislative framework and need for institutions and sector specific legislation in many cases. What is suitable for a toll road would not be suitable for hospital, obviously. The UNCITRAL Guide speaks of the necessity of having a suitable institutional framework for the award, administration, and regulation of the projects.

Now I want to talk about the fundamental financial discipline where private investment has been seen in public infrastructure, and that's the discipline of project finance. Project finance is a methodology. It is not a financial product, but it is a methodology. This type of financing is based principally on the cash flow generated by the project itself. Not on the credit history of the project because there is no credit history in a new construction project. It's all about projections. So it's challenging, because unlike a loan to a well established corporate entity with balance sheets and income statements, a new construction infrastructure project has no history.

Project financing is unique in another sense. The maturity of these financings is very long as compared to corporate financing. And it's one of the reasons why these types of financing appeal to private sector institutional investors such as insurance companies and pension funds who require long term financial assets to make financing terms viable.

Now, successful project financing has several common features. I start with a bankable financial plan. I cannot emphasize this enough. It's necessary if you're going to raise private finance that has a maturity of 20 or 30 years, or more, that you must be able to show financing parties a financing plan. That means not only every year, but every month, all of the expected revenues, all of the expected costs, and the bottom line coverage of the debt service. And that applies using different terminology, to equity investments as well.

So one enemy of this type of single asset long term financing is uncertainty. And uncertainty, to the extent it arises in the government sector, is often labeled as political risk, and it's a major consideration, not only in foreign countries, but here as well. So on the slide I am referring to I've put at the bottom, political viability, which has a lot to do with political risk.

I'll close by showing a diagram of a typical transaction -in this case of a toll-road project. We start by observing, right in the middle of the diagram a single purpose newly formed project company. It's new, it has no history. And it's going to build and operate a toll-road.

At the top of the diagram, we observe boxes for debt and equity investments. The investments rely on project cash flows arising from the array of contracts to which the project company is a party. Looking now at the diagram for a revenue source, we see an operating contract. From this we cannot ascertain all of the revenues for the project are. But revenues presume an operating facility and on the lower left of the diagram is the all-important design and built contract. But where is the project company going to obtain money to pay the contractor? From borrowing an investment from the financing parties mentioned above.

The interdependence of the various project contracts is crucial. The design build contractor cares a lot about the terms of the financing and vice-versa because they're dependent upon each other. And the financing parties care a lot about the operating contract because once the project is built, that's the only source of revenue to get paid back.

On the left hand side of the presentation diagram is a box for the public authority. This contract is the project agreement discussed earlier in addition to containing terms and conditions for the development, infrastructure, and operating of the project, it is also where the government can take certain risks. So, for example, the competitive landscape for the project. And on, and on. The project agreements also describe what the conversion of currency, the contribution of land, and so on and so forth in intertwining parts. They can assure against discrimination of the project I was just describing.

Finally the transaction diagram illustrates risk transfer. Where do we see risk transfer? Well, in all of the project contracts. For example in the construction contract, the project company has essentially by contract transferred substantial portions of the risk it would otherwise retain to design and build the project. From the standpoint of the financing parties, if there isn't a risk transfer by the project company, a particular risk is retained by the financing parties. So the financing parties are intensely concerned with identifying all of the risks, understanding them, and addressing them.

So, for example, let me just give you an example. Let's assume this is a power plant. Should it have fire insurance? Probably financing parties are not a very efficient party to absorb, and price, the risk of fire. It's probably more efficient to take out a fire insurance policy. And that's the philosophy you see in this diagram, namely the efficient allocation of indefinite risks by contract.

In concluding, several words for lawyers, these are great transactions for business lawyers. Business transaction and financial lawyers are very essential. They have to be creative. And it's being part of the team, and an essential part of the team. It's challenging work, and it's multidisciplinary work as you can see just looking at the diagram. It features very sophisticated clients and people really trying to get something useful done. I hope some of you students would have an interest in this line of work.

[Applause]

PROFESSOR WALCHAK: Great, thank you Marty. Clearly they are vey complex a lot of us find our way into this industry through various ways we are not all attorney's up here but some of us are real estate attorney background some of us are construction industry, some of us are finance and you find yourself not with just one off contracts like a typical public contract where you go get the architecture and engineering done and design and build it under one name. All of those subjects are sandwiched together under one contract and the complexities associated with it can be immense. Let me move on now we are going to get a little international perspective from Shyamala Shukla. Shyamala would you like to move into your presentation?

SHYAMALA SHUKLA: If you don't mind I will sit here and do it I could see the other speakers kind of because of this wall try to cramp their necks to look at it and I have a few graphs here so I would like to keep looking at it. Okay. So first of all I would like to thank Alexander and Scott for inviting me here to talk about the global perspective and what I will do here is I will talk more about the finance project finance part and what is actually happening.

Scott talked about all those huge numbers trillions of dollars that need to go into infrastructure globally. These are huge numbers and we need to look at what has happened and what is happening right now. So I've got a few numbers for you here from a few sources, the World Bank has a data base and it puts together the money going into infrastructure the private finance going in to 139 countries and it looks at a whole range and looks at all different kinds of PPPs which Professor Jacobson just spoke about and I need to thank him for really giving you the entire picture of the basics of PPP that will help me now that I don't need to go into that. So the two graphs you see here, the one on the that would be the left for you that is the entire money going into infrastructure globally the project finance market for infrastructure not just private finance it is purely private and private public partnerships it is also the public money going in. So that is the picture you see. You can see it has been coming up and down and in the aftermath of the global crisis in 2009 it really went down in 2009, it bounced up a little bit in 2012 again you can see that it has gone down and in 2013 that market came up but when you go to the other graph the one of the right it is the global PPP infrastructure investment you can see it has consistently gone down 2011 and onwards.

The deal count has gone down and also the investment and you can see the picture has gone down so it is mostly either private investment of public investment with the PPP part of it going down. And we look at a little bit at what has been happening in major key countries which account for most of this money and we look at developing countries.

So here, if you look at this graph you can see what happened in 2012 and 2013 in six key countries the big countries where most of the money went out of mid income and low income countries and you can see that in 2013 there was a decline in the major countries in terms of total investments and PPPs in countries like Russia all of them saw declines. However, on the other hand Turkey, Mexico, and China they saw increases and then you look at the pattern of increases and decreases in Turkey for example an increase you can see a couple of projects have gone for an increase and when you look at Mexico it is mostly the energy sector the plans which have seen this kind of increase.

Then you go down to developing countries the world bank does not collect data on that but we need to continue to look at those markets because we need to learn a lot from those markets in order to provide technical assistance to the developing markets. In many cases what happens is these less mature markets go towards certain trends, which have been seen historically earlier in the markets and have become more mature now like Australia and the U.K. and the U.K. has remained the largest PPP market with very large investment in transport as well as social sectors because when we talked about PPPs in energy and transport sectors and on the other hand in social sectors where most of the money comes in most of the source of income to the private sector is availability payments made by the government rather than those fees charged to users. So U.K. has a large PPP program called the PFI and most of it is paid by the government. They do have what they call pure PPPs where there is also money coming in from the users. In Australia we saw some very high profile huge deals which account for the increases in the total investment that you saw in the earlier graph. And the US of course I don't need to talk about it here we have all the experts here but we can see there has been increasing interests in P3s in the US and we often talk to Patrick about it his is one of the key pieces. One of the key pieces leading this in the federal government.

Now, we saw 2012 and 2013 so what is happening in 2014, it is over but the data is still coming in to us. And 2014 it is not really impeding in that way. If you look at the graph on the left you see the five big countries that have investments the top countries where investments have gone these are Brazil, Turkey, Mexico, India and China. And then if you look at the graph on the top right, the yellow bars, there you have the first half of 2013 as compared to the first half of 2014 and then there is a last small bar on the extreme right, the yellow bar which is the investment for the first half of 2014 without Brazil. So, you can see that while there is an increasing trend in the first half of 2014 if you take out Brazil and some of their major projects, they have done a few airports and then they have done toll roads you can see there has been a distinct decline and for 2013 I should have had another bar over here that shows 2013 without Brazil but I remember the numbers it is around 32 billion U.S. dollars for 2013 without Brazil. So if you look at the two numbers the 32 and the 21 you can see that there is a distinct fall that is around a 30% fall around 2014 if you're going to look at Brazil. So these are the trends and the increases in Mexico again its because of some of the large by plan projects so it's a skewed picture.

If you look at PPI in all of these countries you can see that it's the energy and transport sectors which always account for the bulk of it those are the projects which are happening. Social sectors apart from the very developed markets, it's less you don't see that kind of money coming in the governments cannot pay and the users cannot pay obviously. Sorry I forgot to do that, it was moving differently. In Brazil is it also the 2016 Olympics, I guess the amount of money they are putting into their airports and toll routes which could account for the increases. And what's happening simultaneously as this money is going into different countries is changing like how many PPPs are happening how many deals are getting close.

What's happening to the project structure? Again Professor Jacobson gave a detailed you know he had a detailed, discussion on risk allocation how much of the risk is being transferred and what is the government doing what is the government taking on and what is the kind of risk that's being taken on by the private sector. Here, in the aftermath of the financial crisis we see a distinct change that is happening globally. There's less appetite for certain kinds of risk. If you look at the box where I have given the financing highlight you can see that by 2013 financials have actually moved back into the market even the larger European banks which were hesitating in the aftermath in 2010. 2011 they were still not coming back actively into the market and now they are coming back in 2013 they were almost all back actively in the market.

By 2014, late last year, many of them were back in the market but they were back in the market with a difference. They have less, less risk appetite now and they don't want to take on similar kinds of projects which they were taking on before and they want everything to be backed up by some kind of government protection-backing and in the changing risk allocation type you will see that there is less appetite for demand risk even in the developing countries.

In the developed countries mostly these were wrapped transactions for the UK, it's all availability payments, but in the developing markets for example, India, Brazil, other markets, there was a lot of demand risk that was being taken up by the private sector. Now the private sector doesn't seem to be very open to that and so they are also trying to move to availability payments in many of their projects and new transport projects have come up in countries like India, which had done few of those availability payments in the last five years, they have now come to that and PPA's of course have been explained by speakers before me.

So these PPAs are now no longer just sufficient on their own. There are other forms of guarantees which have to back these PPAs. I work quite a bit in Kenya and some of the African countries and we now have this, you have guarantees which again support the PPAs so these are guarantees given by the national government. The PPAs of course are properties agreements which are signed by the bulk power-buying companies in many of the countries there is just one monopoly, one buyer, a single buyer who buys all the power in many of these countries, not all of them. So now those are being backed by the government, you have either letters of comfort or other kinds of guarantees, partial risk guarantees, which are backing this up.

Then you have the political risk guarantees, where any action of the government if it results in a non-payment of the money under a PPA, and in that case the government, the federal government steps in and it makes good whatever is the difference or whatever has not been paid. And we also see a lot of debt guarantees now coming in, even the UK has got this scheme where it is actually, it's backing up to fifty percent of the senior debt in projects and they closed one project last year. They backed fifty percent of the senior debt that was the Maza Gateway project and government is also coming up with its own debt instruments in countries like India, they have increased debt program offering senior debt to the PPPs.

And on the other hand, what's happening is that while this project structuring changes in these developing countries, countries are also looking to more bond financing. They are also attempting to develop their capital markets and that's not quite happening. Some of them have very short-tailed curves and they don't have, they don't even have reference rates and they are trying to develop these and another trend that we have seen, you might have seen a publication by the OECD on pension funds. This is, this looks mostly at the developed countries but its now also started looking at some of the countries like Brazil, South Africa, and in Latin America region you have Peru and Chile also coming up now. Chile of course is a developed country but you have Peru also coming up but pension funds have started becoming much more active.

What's happening is that where the government is trying to protect the private sector a lot more with exchanging risk allocation, pension funds are now more willing to come in because these are protected transactions and they feel there is less risk, so we have also seen that change happening, gradually, it's a, we have a lot more to cover but it's happening, this is a distinct change that we are seeing. And in innovative structuring it's not available. Long-time financing is not really available to the extent that you want so there, people are replacing it with shorter-term financing, mini-bonds, for example, they became very popular in the Middle-East region, where they could be hard or soft mini-bonds, which could be, hard-bonds have to be refinanced at the end of that eight year period, seven or eight year period, and the softer ones are there, where you don't necessarily need to refinance but after seven or eight years what happens is there's a step-up and you, your loan is much more costly than before so you have an incentive to refinance at seven or eight years. So those kinds of innovative structuring, that's also coming up and BBC. . .a lot of this happening in Australia actually. The long-term market never quite came back and it's also happening in the developing countries where they never had a long-term market in the first place. And coming to areas where I work a lot, that's South Asia and Sub-Saharan Africa-

PROFESSOR WALCHAK: Shyamala?

SHYAMALA SHUKLA: . . .these are. . .

PROFESSOR WALCHAK Excuse me, Shyamala, I have to interrupt not because you have gone too long but because I've probably gone too long at the beginning.

SHYAMALA SHUKLA: Okay, okay, not a problem.

PROFESSOR WALCHAK: So if you could wrap-up. . .

SHYAMALA SHUKLA: This is the last slide, yeah. So in South Asia and Sub-Saharan Africa, this year if you see there is a graph at the bottom, PPI by region, so Africa is the first bar which is very, very small so its come from billions into millions now that kind of investment that's happening this year and if it doesn't increase it will be a real problem and Africa is facing a major problem because of lack of bond markets and because of the fact that government has got to give heavily wrapped transactions and these have to be totally backed by government and that's not quite happening as fast because they already have a huge number of power projects where they have given guarantees and its become more and more difficult given their budgets, given their debt situation, to have more projects in a very fast manner so that's also slowed it down. Legislation policy processes, these stream works are now being built, that's also slowed down the process, and South Asia of course after the economic downturn there have been governance issues which have also slowed it down. So overall the picture is not very encouraging but one thinks that in the course of time when things have settled down and new projects come in with the right kind of structuring, the project finance market which is focused on PPPs is likely to go up, globally. Thank you.

PROFESSOR WALCHAK: Fantastic. Thank you so much. So Shyamala raises a great concern about project finances that typically a traditional public project you go to the Treasury, you ask for the funds, you work it out politically, internally within the government, and now government officials have to look to the private sector and you, and public officials have to become very savvy at private sector finance issues, which is sort of a new element. We are pushing time so I unfortunately have to ask everyone to stay to about ten minutes. If you feel to go shorter, that's fine too but I don't want to, I did invite you out so I would want to give you an appropriate amount of time to talk as well. Next, we have Patrick if you want to give a little bit on the federal perspective.

PATRICK DECORLA-SOUZA: Alright, so I'm Patrick Decorla-Souza and I'm with the Federal Highway Administration, which is a part of the U.S. Department of Transportation. So what I am going to do is simply show how the principles that Professor Jacobson talked about in project finance apply to highway projects in the United States. So we have so far had about twenty projects, there are several in the pipeline in several states in the U.S. I'm going to talk first generally about highway P3 projects, the types of projects we have. I will talk about the role of equity in these projects, the role of debt providers, and finally government subsidies.

So the types of highway projects we have that are P3's are shown on this slide here. Basically there are two types, one that we call Greenfield which is new construction, building new facilities, and if there is an existing toll facility that the private sector takes over and operates that's called Brownfield. Now we of course are more interested in Greenfield projects because we want to increase the amount of infrastructure built in the U.S., so we are concerned more with the new construction and there are two types there under Greenfield. There's design-build-finance where you simply have the private sector finance the project for a certain period of time but not necessarily operate it and the other one that's in bold, design-build-finance-operate-maintain, the private sector also takes over the operation and maintenance for a certain period of time, usually thirty years or more. Now as it has been said before, these can be funded and repaid, the private sector can be repaid either through user charges such as tolls in the case of highways or through availability payments which are payments made by the public agency to the concessionaire. Whether or not there are tolls these payments are made, and if there are tolls the tolls go to the public agency instead of to the concessionaire.

So three basic reasons states in the U.S. are moving to public private partnerships. The first is private financing. Since they don't normally have money in their budget or they have debt capacity limits they are seeking to advance projects. But as a result of project finance what they also get is superior management and operation of the facility because of this private sector interest and financial incentives. Now in highways by bundling design-build- and operate, operation of the highway, you are able to get some efficiencies relating to life cycle costing.

For example, you might build the facility a little stronger so that your maintenance costs are reduced and thereby you not only save life cycle costs but actually reduce issues relating to fixing the highway and having to shut down lanes causing disruption of traffic.

And the third one of course is risk transfer. As we have said before, the private, the public sector is able to control its budget by transferring some of these risks, the public sector is able to control its budget in the future and have some budget certainty. So, this slide lists the types of risks we have in highway construction. The first two are normally either completely taken over by the public agency or shared with the private sector. Construction and operations are generally transferred to the private sector. The termination and handback risks are shared.

The way these risks are transferred are through contracts, and we've talked at length about contracts so I won't spend a lot of time, but contracts are essential to ensure that the parties that are able to manage those risks are taking responsibility for handling those risks. So, in the U.S., projects are financed first with equity. Of course you'll always need equity- that's what's required so that the private sector has skin in the game, as they say. And then, a lot of the finance, the upfront funding, comes from debt. And generally, the equity investors or the project developers try to have as much debt as possible so that they can reduce the amount of equity they have in the project, and the reason is: by increasing debt, debt is less expensive, the cost of capital is less expensive, so the more debt you have – the lower the overall cost of the project. So, of course, lenders aren't going to just volunteer to provide as much debt as equity holders want. I mean they will look at the risks inherent in the cash-flow payment streams. And what you see here is, the more risks you have, the more need for equity and mezzanine or subordinate debt. Payments for subordinate debt are less certain than for senior debt. So, I will very quickly go through equity investment here.

What you see in this slide, is what is called a cash-flow waterfall: All of the other investors are paid first. In other words, the debt providers are paid and the operation costs are paid for before the equity investor gets paid. So they only get paid near the end of the cash-flow waterfall and take the highest risk. And of course that's why they also require the highest rate of return. Equity investors are various types. There are sub-contractors, like design-build contractors, and operations contractors or maintenance contractors who are interested in being equity investors because that way they are sure they will get the contract or the work, and they can make extra profit from the work they do for this single-purpose company. But, usually you have, in addition to the subcontractors, you have investment banks, which you see in that second row there, financial institutions. And these are developers that actually are willing to take a lot more risk at the construction phase, so they require a much higher rate of return. But, after the project is built, these financiers try to back off and sell their interest in the project – their equity shares — to that third row, which is the pension funds and insurance companies we talked about earlier. The pension funds don't want to take those big risks up front. They want to be pretty sure that they are going to get their money thirty years from now. So they wait until the project is built and all the risks are taken care of in the construction. And then they will get into the project, but of course at a lower rate of return than developers. So, this slide simply shows you how in toll revenue projects, which are user-based financing, you have less certain payments to the concessionaire and in those cases equity share has to be a lot higher than if you had availability payments which are the last four on this list of projects in the U.S. Those have a much smaller share of equity because debt providers are willing to provide more funding for the projects.

So we can now go to debt providers. As I said earlier, you have senior debt holders and these are bond holders or banks. Those are the two types of lenders that provide debt to a project.

What the federal government has done recently, since about 10 years ago, is try to help these markets. Normal debt is not tax exempt. In other words, state general obligation bonds are tax exempt- as is any state issued debt. But a private partner, going into the market normally will not be able to get tax-exempt debt. So, the federal government has authorized something called private activity bonds, which are tax exempt and these can be allocated to these P3s simply to bring down the cost of financing to make P3s more financially feasible. This is an example — Midtown Tunnel, a project in southern Virginia. It shows you the relatively low rates they got on their debt because it's tax-exempt. And the reason you see this entire series of bonds is the repayment of the debt can be strung out over the term of the concession.

Another thing that the federal government has done is instituted Transportation Infrastructure Financing Innovation Act loans (TIFIA). What this program does is provide loans with an extremely low rate of interest. It's really the triple-A rating of the federal government. So, right now, it's somewhere in the range of three-four%, even less than the private activity bonds that you saw. And, the other thing is the federal government is pretty flexible; allows repayments to start five years after completion of construction. So you don't have to start paying right away, it's much more flexible. So most P3 projects in the United States make use of TIFIA loans. You can see from the interest rates there – you can see why they would want to use TIFIA loans. You have to go through a little bit of bureaucracy, as with any government loan, but they think it's well worth it because of the fantastic rates of interest that they are getting.

And look at the long tenor. TIFIA is subordinate debt, it's lower ranked in the cash-flow waterfall. And normally the tenor of subordinate debt isn't more than roughly ten years but the federal government provides this debt for as much as 35 years after completion of construction, and of course if you add the time for construction, it's up to 40 years of tenor, which would be unheard of in the subordinate debt market.

So here's how all of these financing sources pan out. You can see developer equity – they actually get the highest rate of return, as much as 25%, simply because they take on all those risks. The next one there is long-term equity, those are the pension funds and you see that they can be asking for as much as 16 or 17%. Subordinate debt is in the range of 10%, as you can see it's shorter tenor. But there is no longer any P3 concessionaires using that – they are going for TIFIA, which is the bottom bar there and you see something in the range of three-four percent and tenor for 35 years. And private activity bonds go over 40 years with only five percent rate of interest.

So, one of the issues in the U.S. is toll revenues are not adequate to pay for highway construction. If we need a new highway, we need government subsidies. There are several benefits of government subsidies; of course one is to make the project financially feasible because if the toll revenues are not adequate the money has to come from somewhere. In other cases, you could raise toll rates, but then you would get public opposition if the toll rates are too high. So sometimes the government comes in and provides subsidies to reduce the toll rates. And of course if the government provides up-front subsidies on an availability payment project, the payments in the future are going to be lower. So a lot of good reasons why the government actually comes in with subsidies on these projects. In the U.S., you see here some of the percentages of government subsidies. These are up-front, whereas availability payments are paid throughout the term as a repayment for service being provided. But these are up-front subsidies, and you can see one on the top is actually an availability payment project but they still provided almost thirty percent in subsidy upfront simply because they could reduce their availability payment. Some of the others where you see zero percent, it is really not zero percent in the sense of subsidy. Instead of paying a subsidy upfront, what those projects did is actually pay it after completion of construction—so they're called milestone payments, and they provide an incentive to the concessionaire to complete the project on time.

PROFESSOR WALCHAK: Patrick, if I could interject actually, we are working with TIFIA on our projects. The Purple Line is actually one of the candidates for having a TIFIA loan on it. I do have to cut you off because I am worried about folks staying late, but thank you Patrick. Alright we're going to move on to Jodie really quick for the Maryland perspective.

JODIE MISIAK: This is great. People have covered most of the technical details I usually cover in slides so I can talk about the things that

I really like to talk about which are the projects. You see, these are complicated and involve a lot of upfront man hours, and very diverse teams, and so when the state, Maryland, decided to go forward with both a P3 program and specific P3 projects, it was very important for us to know what we were getting ourselves into, and why we were doing P3s. And I think that is sort of at the heart of both our P3 law, which as mentioned was earlier was enacted in 2013, and the projects that have come both before the law, that inspired the law, and made us realize we needed a clear framework for pursuing these, and the projects that will come after in the pipeline. So let me talk a little bit about those projects.

Back in 2010, one of the first—we thought about P3s, and as pointed out earlier, private sector involvement in public infrastructure has been going on forever. But it has only been over the past couple of decades that we've been thinking about it in this way of the complete range of functions for a piece of transportation infrastructure. The one that really kicked it off for Maryland was Seagirt, which is, if you go down to, you can go to see it, you can't go onto the grounds, but you can go and see its the container terminal down where the rest of the port facilities are. We had realized back, prior to 2010, that there were going to be much larger ships coming through the Panama Canal after it was expanded, and that we were not prepared, and that we did not have the money, we did not have the expertise, and we just were not ready. So, we decided to go ahead with a— this was actually before I came to Maryland, so I say "we", but the state of Maryland decided to enter, to pursue a public-private partnership—full range of functions—construction of a new facility financing of that facility, upfront funding of that facility, and then operations and maintenance of the facility over fifty years. That was before we did the law, but it created and was done under previous authority for revenue generating projects, but it created this idea that you could take an asset, and have the private sector step in, and you could get benefits that were sort of win-win-win for everyone that continued over time if the contract was structured well.

So that was the Seagirt project and following that was Travel Plazas, which you can actually go visit. You drive up and down I-95, the one that goes up to New York and New England, the travel plazas in Maryland, the Maryland House and the Chesapeake House. Those who visited it in previous years probably were not impressed. They were old, they were falling apart, they were not well managed. The state of Maryland realized that we had to replace those very quickly as the contract was winding up. So, we entered into a public-private partnership for those, and that's a thirty-five year contract where now you can visit both of those very nice facilities, operated and maintained by experts, not by the state of Maryland—we are not experts in the provision of travel plaza services. And again, a contract that is well structured so there are benefits coming back to the state. We have control over the functionality of those facilities, and really have confidence that we are providing infrastructure in a way that we feel best suits the Maryland name.

So, those types of projects led us to decide that a broader framework was needed. We needed to do more of these projects on a larger scale. In 2013, we managed to pass a law that hit upon all of those key points that the other speakers mentioned. We stole a lot from Virginia, we stole a lot from other neighbors, but we also gave it a Maryland flavor. We have unsolicited proposals, but they all have to go through a competitive process. We have certain labor provisions that we speak to in the law. It has a very specific approach that ties in with Maryland policy as well, which was very important as we were going through the law.

So now we have the law, and we have the Purple Line as the first project—you may have heard of it—that has come out after the law. We literally initiated it months after the law was enacted because that was the project that we really wanted to do with a clear framework. We are in the middle of a solicitation for that right now. We have four excellent teams in that same sort of diagram that was shown before of equity, and design-build, and operations and maintenance, and railcar providers. Purple Line will be a light rail transit facility that connects across Montgomery County and Prince George's County, like you're connecting the spokes of the wheel of the WMATA system, such that you can get across those counties with transit that will be a 35 year 'DBFOM', so design-build-finance-operate-and-maintain P3.

So watch out for that P3 that is coming up, but it builds on all of the story that previous speakers have been helping to tell about how this can help benefit government at the end of the day. You don't do P3s just because they are fun, or they are interesting, or they involve a lot of diverse teams. You do it because it provides benefits to the public-sector in some way that you wouldn't have been able to achieve before. So that's the State's perspective on P3s.

PROFESSOR WALCHAK: So Jodie's my client, so I owe you a cocktail or something for keeping it brief, so thank you. And then to wrap it up, John Smolen who's got the heavy task of keeping us going for the last few minutes. John is a private-sector practitioner in a private law firm, and I hope if I can steer your presentation at all, it would be to that focus of how does a private sector attorney handle these, and I think your presentation does some of that.

JOHN SMOLEN: So I have the unhappy task of being the person that stands between you and either sleep, beer, or food. When I was in the Navy, I was given some of my best leadership advice, which was 'don't stand between a sailor's lunch or liberty', so I'm going to add that beer to the list because that's what I plan on doing after this.

So without further adieu, Scott is right, I was already focusing through this entire event (as you may have seen me feverishly writing things down) on where the rubber meets the road. I'm a private sector lawyer, and I'm a private sector lawyer who devotes his life, for better or for worse, to infrastructure public-private partnership deals, particularly in the last several years. I was pleased to see in Patrick's list of projects examples that eight out of ten of them involved Nossaman's Infrastructure Practice Group. I did have a hand in a couple of them. So, we've heard a range on what P3s are, why we have them, what they're supposed to do, and now it comes to the lawyers in the room. And I think Scott, it's probably not inappropriate to suggest that—I'm sure I have the agreement of my distinguished panelists—that the lawyer's role is the single most important role in the entire project. Not even a little laugh, okay. We're working on this folks, we're going to laugh, we're going to cry because I am promising you that I will get you to your beer.

Okay, so interests from a policy perspective, interests from a lending perspective, interests from a public's perspective—all of those end up in conference rooms, generally without windows, sometimes with stale cookies, where all are involved in figuring out exactly how this thing is going to get hammered out.

I've decided to start mid-presentation by considering who is in a P3 deal. Well guess what, the public is in a P3 deal, and the public is not used to negotiating deals with words like 'finance' or 'subordinated debt', 'mezzanine', 'gearing ratios' in it. This isn't what the State does, right? The State's job is to police things. It's supposed to provide public goods; it's supposed to ensure that the infrastructure is in place—wait a minute— now there might be a better way to do that, and it involves using all of these words. So the public sector is looking for lawyers. Marty had a great slide that showed all of the participants in a P3 deal, all of whom have lawyers. My contracts professor told me n law school, 'if there is a thing, there's a law of the thing, and it probably involves a contract.' So, there are public-sector lawyers. Scott is with the Attorney General's office. His brain is oriented toward preserving the public's interest. In happy situations (under the veil of our attorney-client privilege), we have banged heads about, 'well that's not what the public does.' And my response was 'well this is a P3, and the public now has to think about this.' That is part of the gristmill of a P3 deal.

The other participant in a P3 deal is the private sector, who's not used to the fact that the public sector doesn't speak its language. And sometimes the private sector needs to realize that it is not dealing with a for-profit entity; instead it is dealing with someone whose interest is in providing a public good. So the language is a challenge, and, oh, the private sector has its own lawyers.

To the complexity point: Yes, we've added financing. Now we are also talking about the thing that we are building, and we have two people talking about it. Under the design-bid-build scenario, the government says, 'I want to build a bridge or I want to build a water/waste-water system; here are the plans.'- as you said it, Preston, 'build to the plans.' Well now you have technical advisors on both sides saying, 'Do you really want to do it that way? Have you ever thought about doing it this other way?' Okay, there are lawyers that are involved in that discussion.

And there are financial advisors (that I have already jokingly maligned probably too much), who speak in an entirely different language that the lawyers need to understand to translate it to everybody else.

And procurement professionals—this is the oft misunderstood, 'what are the rules for *how* we are talking about this, *when* we're going to talk about it, *who* sees what, how it is that we're going to protect particular interests, how is it that we are going to show people what's going on?' Those are rules derived of the law and the statutory procurement acts. Somebody needs to keep track of that. There are lawyers. This is a little bit of a lawyer pitch, but I am, after all, speaking at a law school.

And there are policy professionals. Policy professionals are people who are saying, 'we've got these problems to solve; what is our appetite in the political environment or in the legislative environment, for our state to do this thing, and what about that requires you to hire lawyers.' They have senses of - now this is really important to this particular interest group or demographic - how and when this particular government or legislative body operates, and the policy professional says, "We need to think about that or there's no way this thing is going to fly." That is really important stuff. States, water/waste-water entities, even power companies under grid-supervising regulatory interests, have interests that have policies in them and people need to be sensitive to them adding to the complexity of the deal.

Lenders, I don't want to malign lenders, but besides financial advisors who talk about how to crack the nut, lenders are people whose job it is to make sure that every possible risk that could possibly be conceived is ferreted out and assigned to someone else. Still no laughs. And they have lawyers. So are in the business of talking about how the project owner's financial advisor's magic plans about finance the deal is actually going to play out - whether or not a banks are going to show up.

Now this is the one that might be mildly controversial. In a P3 deal, you're also inheriting the long line of P3s that have come before you, internationally and domestically, and the decisions that you make are going influence the viability of somebody else's efforts to do P3s somewhere else later. Whether you care about that depends on who you are on this list, and it also depends on when you're doing it on this list. The Purple Line that Jodie mentioned is the next big P3, and the next big P3 will be referred to in subsequent P3s. And I'm sure that in Purple Line discussions, references were made to all of the projects on Patrick's list that had come before.

Are they participants? I think they are participants because you have to pay attention to how other people have cracked similar nuts and negotiated similar problems before. Did they have lawyers? Yes! Which brings us to the lawyers.

So the role of the lawyer is really about being the rubber meets the road guy. I keep using the transportation analogies because you're [Patrick Decorla-Souza] sitting so close to me. I've decided that the way I can get through the next five minutes - I promise, and somebody can throw something at me at five minutes and one second - is to give you a list of why things are happening they way they do in P3s, which list bleeds over a little bit into how lawyers generally, in transactions of this scale, are going to be operating the way they do. I may also end up giving just a little bit of advice to some of our future lawyers who decided to devote some of their Thursday night to sit here and listen to us with their neckties on, presumably because they want to do this for a living. So they might benefit from some of that.

A lawyer brings to the table foremost their experience of past deals. I cannot understate this at all: this is not merely a 'well they did it this way here, they did it that way there;' it's often times 'look, you want to do this, it ain't never been done, but here's a way it might work.' or 'now, do you want to do it that way? do you break new ground, or do you guys want to shoot down the middle of the fairway?' These are lawyer-drive calibrating opportunities. Preston mentioned the PPTA in Virginia. Those guys took a machete and started carving up the trail of how it is that transportation projects were going to be done in the United States. They were bold; they were comprehensive, and they made decisions. Now, there are a lot of people who've come behind them that say 'I like how Virginia did it,' and there are a lot of people that come behind them and say 'I don't know about how Virginia did it. Are there other ways to do it?' Well, they turn to the lawyers who participated in the PPTA, who've negotiated other deals, and we give them an array of answers, and then we interact. 'You don't seem totally risk averse; you want to try it this way. It worked in Namibia, but we've never done it in the United States, so what do you say?' Or, 'looks like you guys are really nervous about this, it really boils down to these three options. Pick one of them.'

I will underscore that not one but two of my prior distinguished and illustrious panel members mentioned in their presentations that a successful P3 is centrally about optimizing risk sharing, and optimizing risk sharing (in my sort of innate negotiation room brain) means 'who can manage this risk better.' Not 'who can eliminate this risk,' but 'who can do something about the risk to diminish any of the contingency that may go into the pricing the deal we're doing' - meaning, 'how much are they going to charge the project owner, and how much they're willing to eat.' There's the P3 (transactional) lawyer's magic words: identify, allocate, and mitigate. And I think you guys used the same words in almost the same or in the exact same way. You must have seen my slides. Or I saw yours.

Ok, so I've described to you the lawyer's experience role, and now, moving fast, let's talk about the lawyer's translator role. I've already alluded to this a little bit, but I have a couple very small anecdotes. So engineers are notorious for speaking in the passive voice. Who here has taken their legal writing class and banged their head against the wall? An engineer friend told me that the secret to a perfect marriage is to speak in the passive voice. You walk into a room and you say, 'The dishes need to be done.' No one in that situation has been assigned the responsibility to do the dishes, but you have declared what the outcome needs to be. Lawyers, by contrast, are notorious for writing in the active voice, because lawyers want to know who's on the hook to do the dishes. So, as a lawyer, I translate performance or other specifications from engineers into, well, who's exactly going to do what.

There's a lot of angst in that rubber meets the road exercise - a lot of heads smiling in the audience - because it is important at the end of the day when the dishes aren't done who's on the hook for it. My second anecdote - the interface story, from a project that will go unnamed. I was reading a specification - it was 20 pages long and discussed how interfaces were going to be specified for this particular project. The word 'interface' was used as an adjective, as a verb, and as a noun. And so my question to my technical advisor colleagues was 'how are we going to defend our decision to default our counterparty when their interface failed to interface?' And that ultimately led to a redrafting of the section to speak in a way that a person could read it and say 'Bob's job is to do X.' So you spend time reading things and ferreting out how things are going to play out, like a "Choose Your Own Adventure" book where you read the end first.

One more anecdote about banks. I'm in a room and people are talking about lumpy payments. I went to law school. I know what offers are; I learned about acceptance and consideration. I actually know what a tort is as distinguished from a tart, which is a moment I had in class frantically searching dictionary.com. To be honest, as a 1L what's a tort? it sounds good if it's right out of the oven. Here I am in a room talking about lumpy payments, alright? Lumpy payments, if you care to know, are the idea that I am going to pay a little bit more now and a little less then or pay a little less now and a little more then. People like Scott say, "We can't forecast in an appropriations process lumpy payments. We have to give them smooth payments." Then I look around the room and see how many people are also not figuring out what 'lumpy' means. So you're the lawyer that stops and says, 'How do I write in the contract smooth payments, without using the word lumpy? How do I write this in English.' Plus, I will warn you, all of the magic words you use in your UCC classes are going to be words that you're going to be expecting everyone else to know and they don't.

Now, probably most important one. Here in law school, there are a lot of concepts you're going to dump because you don't think they apply to the real world. They do. On my drive up, I was talking to a client who read to me over the phone what he wanted to put in the draft of a change order (that's an amendment to a construction contract, by the way). He said, "I want you to do X in accordance with the specifications in Exhibit X, which says, in not so many words, 'blah, blah, blah. . .' And I said, 'Why do we need to say that when we can just point to Exhibit X? Because when we sign this thing, what you say about it is irrelevant to how it is that people will know whether or not they need to do it.' When they sign something, the parol evidence rule happens. The words that scare the heck out of me as a lawyer are 'what we meant to say was . . .' because that means I failed to do my job. So, lawyer as issue spotter. Punch line is, when someone comes up with a masterful plan about how some particular arrangement or commercial arrangement is going to be reached, you have to make sure there's not a problem with it. So you get to be the "what if" guy. Well what if a tornado hits it? Well what if the tornado comes with a flood? Well what if the guys don't show up on time? And then all of a sudden, you're the annoying guy asking a million questions that ultimately lead to there being words in a contract that you can lean on that assigns the risks that Marty talked about.

Lawyer as negotiator. Pretty obvious. It's really easy for me to go into a room and advocate for my client's position all the way until everyone walks out of the room. So what you need to know how to do is know what happened (and is happening) in the market, which means being familiar with those market participants I talked about earlier. You have to know what they did. You have to know who the people are across the table from you and sometimes you have to know the people themselves that are with those organizations that are across from you. And you have to do your homework in advance. Once you figure them out (if you can figure them out), where their organization is coming from, why they're doing what they're doing and how people have handled this in the past, you can actually get through a negotiation to solve the problem. Everybody wants to walk into a room and get their point of view. If you walk out of a room and everyone is mildly pleased but kind of annoyed with how it went, you nailed it as a negotiator.

Last one: lawyer as draftsmen. This follows from all of the others. It's the hardest thing in the world to write it down. The advice that I got when I was a law student from Justice Thomas: he said there's three important things that you need to do as a lawyer. Three. Write them down, he says to me. He said edit, edit, and then edit again. Because no matter how clear it is to you in your mind, it's not entirely clear until your mother can explain it to you and your mother didn't go to law school.

These are the roles of the lawyer in a P3 deal. You're pulling the complexity together, in English, mindful of your client's position, mindful of the positions that people are taking elsewhere and also mindful of the fact that this is going to be the thing that someone, who didn't write it, wasn't in the room, is going to administer over forty years. If you get a bank to lend into it, you get Uncle Sam to decide to give it one of its policy-driven investments, if you get people to write about it in the trade press and you actually get a phone call to do another deal, then you did a good job as a P3 guy.

PROFESSOR WALCHAK: Thank you John. So I clearly can't beat that but I do remember a story of having to distinguish between the difference of 'have done' and 'have been doing.' And I had to explain that to someone who didn't speak English. And that was very difficult to do. And it's a little bit like drafting a contract sometimes. So I do appreciate that. We are over but I do also appreciate your attendance and your curiosity on the subject. So, if there are questions, we'd be happy to handle them and talk to you about the topic. So now's your chance, otherwise I'll be dismissing you from class. Any questions at all?

QUESTION FROM THE AUDIENCE: Yes, please. I have two actually sorry.
Question for the state. Can you tell us who the private contractors are or toll takers or is that a state secret?

JODIE MISIAK: No, definitely not a state secret. For Seagirt the private partner is Ports America Chesapeake is the entity. For the travel plazas, we ended up with a Spanish firm called Arias that is very well known in Europe and actually saw this, they had done projects in Florida and had seen this as the next step in breaking into the U.S. market. So, it was a great surprise for us to encounter them. And then we have four teams that are currently in part of the process for Purple Line. So, that's you know still up in the air.

PROFESSOR WALCHAK: And once a contract is awarded, even before that to some degree, all government information is subject to the Public Information Act, so there's really no trade secrets necessarily that the government, we have very limited protections for things that are maybe in active deliberation or those sorts of things that we can protect, but otherwise it's all open to public inquiry and inspection. Yes?

QUESTION FROM THE AUDIENCE: Two quick questions, How do you allocate, how do you know if you've allocated risk efficiently, and my second question is, how do you protect your governor or your mayor from saying kick back to me?

PROFESSOR WALCHAK: Do you want me to answer that?

JOHN SMOLEN: I'll answer the first one. How do you know? You don't really know if you've allocated efficiently until it plays out. Strong indicators are: that you have, through the procurement process, people actually participating by giving you their qualifications and then ultimately after that you screen them, they get proposals to you. If you get to the point where everyone who is qualified, proposes, and the proposals are generally under what was in the market as the engineering estimate of a particular project, then that's a really strong sign and if you haven't gone too far afield from being able to quantify the risks that you retained at the public sector level, for example. That's my two cents on a drive by answer.

MARTIN JACOBSON: This is where you get into the value for money analysis. Which is actually the miracle of very, very highly developed and possibly under review but that's the goal of the money for value analysis.

QUESTION FROM THE AUDIENCE: Well the reason why I asked the question is how do you know that the person who says they are taking the most risk and might demand this amount of return, how do you know that you're not giving up too much?

PROFESSOR WALCHAK: Well it's a qualitative examination to some degree so it depends on how the solicitation is structured. Just to give you an idea of a typical government procurement, it's very government driven, it's controlled by us, we set the terms and specifications, and we know whether its tolerable by the number of people that bid. And if they come back and bid, we think that our terms obviously must be acceptable to someone. And the P3 project, and very specific to Maryland, we've taken that process and kind of turned it around, so we've invited a lot of these potential bidders into the early drafting of our specifications where they, all of them get to comment and provide input, we don't have to accept it, but they are trying to provide some value input into what we are going to put out. And there's this constant dialogue of are we pushing it too far? Will we maintain them? Are they going to bid? Will they stay through this process? So, ultimately it still comes down to that moment of bid, but that's that calibration that John's talking about. Where on a daily basis, we're saying, okay if we push this clause, this far, are we going to lose our proposers? Is it just intolerable in the market for them to take this type of project on with that amount of risk. And it's a guess, ultimately. But you know when they show up and bid then we'll know for sure.

QUESTION FROM THE AUDIENCE: Is anyone gonna touch my governor mayor question?

[Laughter]

PROFESSOR WALCHAK: I actually forgot what it was, whether, oh picking. I mean the entire process, I mean first if you go back to the original procurement, yeah I will definitely, I mean I do happen to be the expert on procurement here, except for possibly John, on a lot of these things, but in, you know in the process of procurement is it's created to eliminate exactly what you're talking about. Is the procurement officer, the authority of the executive branch is pulled out of those executive political officials and placed within the procurement process and in the procurement officer's hands. That's done by the legislature. So they know that the executive branch is subject to political input and sort of nuance, and so they don't even let the Secretary of Transportation or the Board of Public Works really make those final decisions. A lot of it happens on the ground, by agency needs and decisions, with several checks and balances with the Attorney General's office, the Board of Public Works for final approval, often times with legislature review and consent, so there's multiple layers in there of checks and balances, but I won't be the only answer to that question.

JODIE MISIAK: We also warn them that if we do not look like we're competitive, these firms are very likely to protest. Private-sector firms won't come back if they think the game is rigged. And we are very clear about that to our leadership, that this has to be as robust as any procurement out there.

JOHN SMOLEN: And they're expensive and all of that value you got out of them is sucked away.

PROFESSOR WALCHAK: Okay are there any other questions? Well we thank you very for staying through this entire presentation and especially to our panelists for coming, a long distance, in many circumstances and cases, and bringing their expertise from all the various areas that they come from. And thank you for your interest all night and all evening long.

[Applause]